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OFFICE OF PETITIONS

In re Application of :
CONNER :
Application No. 09/917,392 : **DECISION ON PETITION**
Filed: July 27, 2001 :
Attorney Docket No. H0001551 :

This is a decision on the petition under the unavoidable provisions of 37 CFR 1.137(a), filed November 29, 2006, to revive the above-identified application.

The petition is **DISMISSED**.

Any further petition to revive must be submitted within TWO (2) MONTHS from the mail date of this decision. Extensions of time under 37 CFR 1.136(a) are permitted. The reconsideration request should include a cover letter entitled "Renewed Petition under 37 CFR 1.137(a)." This is **not** a final agency action within the meaning of 5 U.S.C. § 704.

The application became abandoned for failure to timely reply within the meaning of 37 CFR 1.113 to the final Office action, mailed October 18, 2004, which set a shortened statutory period for reply of three (3) months. No extensions of time under the provisions of 37 CFR 1.136(a) were obtained. Accordingly, the application became abandoned on January 18, 2005.¹ A Notice of Abandonment was mailed September 7, 2006.

A grantable petition under 37 CFR 1.137(a) must be accompanied by: (1) the required reply, unless previously filed; (2) the petition fee as set forth in 37 CFR 1.17(l); (3) a showing to the satisfaction of the Director that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(a) was unavoidable; and (4) any terminal disclaimer (and fee as set forth in 37 CFR 1.20(d)) required pursuant to 37 CFR 1.137(d). The instant petition lacks item (1) and (3).

¹ The amendments filed on January 25, 2005 and February 14, 2005 are labeled proposed amendments. The response filed on August 11, 2006 was untimely, because it was submitted beyond the statutorily mandated period for response set forth in 35 U.S.C. § 133, and should not be treated by the examiner.

Regarding item (1), a reply under 37 CFR 1.113 to a final action must include a request for continued examination (RCE) under 37 CFR 1.114 (accompanied by a submission that meets the reply requirements of 37 CFR 1.111 and the requisite fee) or cancellation of, or appeal from the rejection of, each claim so rejected within the statutorily permitted period for response. The petition makes reference to the filing of an RCE on February 18, 2005 and the inclusion of a copy of the RCE with the instant petition. However, neither the original RCE nor the copy is located in the record. Accordingly, the reply to the final Office action of October 18, 2004 required for granting a petition to revive has not been received.

As to item (3), the petitioner argues that the RCE was timely filed on February 18, 2005 and, in essence, takes the position that there was no delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(a). As stated previously, however, a review of the file does not include the RCE purportedly filed on February 18, 2005 or the copy of the RCE stated to have been submitted with the instant petition. At present, because there is no evidence of an RCE being filed timely, petitioner has not shown to the satisfaction of the Director that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition was unavoidable.

In order to satisfy requirement (3), the petitioner must demonstrate the timely filing of an RCE using the procedures set forth in 37 CFR 1.8 or a post-card/electronic acknowledgement receipt. For example, petitioner may establish that a reply was filed with a postcard receipt that properly identifies the reply and provides prima facie evidence that the reply was timely filed. See MPEP § 503. Where a certificate of mailing under 37 CFR 1.8 is relied upon in a petition, see 37 CFR 1.8(b) and MPEP § 512. As stated in 37 CFR 1.8(b)(3), the statement that attests to the previous timely mailing or transmission of the correspondence must be on a personal knowledge basis, or to the satisfaction of the Director of the USPTO.

An extension of time under 37 CFR 1.136 must be filed prior to the expiration of the maximum extendable period for reply. *See In re Application of S.*, 8 USPQ2d 1630, 1631 (Comm'r Pats. 1988). Since a \$1020 extension of time fee submitted with the amendment filed on August 11, 2006 was subsequent to the maximum extendable period for reply, petitioner may request a refund of this fee by writing to the following address: Mail Stop 16, Commissioner for Patents, P. O. Box 1450, Alexandria, VA 22313-1450. A copy of this decision should accompany petitioner's request.

There is no indication that the person signing the petition was ever given a power of attorney to prosecute the application. If the person signing the petition desires to receive future correspondence regarding this application, the appropriate power of attorney documents must be submitted. While a courtesy copy of this decision is being mailed to the person signing the petition, all future correspondence will be directed to the address currently of record until appropriate instructions are received.


Further correspondence with respect to this matter should be addressed as follows:

By Mail: Mail Stop PETITION
 Commissioner for Patents
 P. O. Box 1450
 Alexandria, VA 22313-1450

By hand: U. S. Patent and Trademark Office
 Customer Service Window, Mail Stop Petitions
 Randolph Building
 401 Dulany Street
 Alexandria, VA 22314

By facsimile: (571) 273-8300
 Attn: Office of Petitions

Telephone inquiries concerning this decision should be directed to Denise Pothier at (571) 272-4787.


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Office of Petitions

cc: Black Lowe Graham
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